ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

POLICE OFFICERS ASSOCIATION OF MICHIGAN,

Plaintiff/Appellee,

v

OTTAWA COUNTY SHERIFF, ~~GARY A. ROSEMA, THE COUNTY OF~~ OTTAWA, and OTTAWA COUNTY BOARD OF COMMISSIONERS

Defendants/Appellants.

SC No._____

Court of Appeals: 244919

Lower Court No: 02-42460-CZ

Ottawa E. Post

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APPLICATION FOR LEAVE TO APPEAL

Defendants-Appellants, Ottawa County and Ottawa County Sheriff ("County Co-employers"), by and through their attorneys, Silver & Van Essen, P.C. move this Court pursuant to MCR 7.302(A) for leave to appeal the October 14, 2004 Opinion of the Michigan Court of Appeals, "On Reconsideration" (Attached As Exhibit A):

STATEMENT REGARDING OPINION APPEALED FROM AND RELIEF SOUGHT

"HIATUS GRIEVANCES" in the present setting are those grievances filed by a union during the period after the collective bargaining agreement expires and prior to the implementation of a new collective bargaining agreement after a 312 Arbitration award. "RETROACTIVITY OF GRIEVANCE PROCEDURES" refers to a potential provision in the new contract's grievance and arbitration procedures that makes them applicable to the HIATUS GRIEVANCES. "PROSPECTIVITY OF GRIEVANCE PROCEDURES" refers to a clause in an agreement that would extend the grievance and arbitration agreement beyond the term of the agreement to cover future HIATUS GRIEVANCES.

In a January 3, 2002 decision, a 312 Arbitration Panel ruled that procedurally, the Plaintiff-Appellant ("POAM"), failed to raise ***in its petition or at a prehearing conference***, RETROACTIVITY OF GRIEVANCE PROCEDURES as an issue for the 312 Arbitration. POAM appealed and the Ottawa County Circuit Court upheld the 312 Panel's decision. POAM appealed to the Court of Appeals.

In an August 19, 2004 Opinion (See Exhibit B) that was scheduled for publication, the Court of Appeals reversed the Circuit Court, holding that the Act 312 Panel's procedural decision "implicitly" found that RETROACTIVITY OF GRIEVANCE PROCEDURES is an "economic issue" and, therefore, that MCL §423.238 applied. The Court of Appeals then interpreted language in MCL §423.238, which obligates the ***312 Arbitration Panel*** to identify ***"economic issues"*** in dispute ***"at or before the conclusion of the hearing"***, as requiring a 312 Arbitration Panel to consider any issue raised ***by a party*** at the hearing, regardless of whether the issue was raised in the petition or at the prehearing conference. It remanded to the312 Panel for it to decide whether the 312 Award should include an obligation that the County C0-employers arbitrate the 12 HIATUS GRIEVANCES filed by POAM.

The County Co-employers moved the Court of Appeals to permit them to supplement the record and reconsider its decision because the POAM in subsequent 312 proceedings acknowledged that RETROACTIVITY OF GRIEVANCE PROCEDURES is legally, a noneconomic issue. In an October 14, 2004 Opinion, the Court of Appeals denied the motion to supplement the record and although granting the motion for reconsideration, reaffirmed its Opinion. The only change the Court of Appeals made to its Original Opinion was to drop it's finding in footnote 3 that the 312 Panel "implicitly found" that RETROACTIVITY OF GRIEVANCE PROCEDURES is an economic issue. Instead, the new footnote 3 assumes that the 312 Panel made such a finding, apparently merely because it cites MCL § 423.238. The Court attaches "conclusivity for purposes of this case" to the Panel's "assumption through citation."

For the reasons stated in this Application, the County Co-employers request that this Court accept this case for either complete or summary review, reverse the October 14, 2004, published opinion of the Michigan Court of Appeals, and affirm the Ottawa County Circuit Court Judgment and Order.

QUESTIONS PRESENTED FOR REVIEW

1. **Michigan precedent holds that a Act 312 Panel lacks the authority to grant a retroactive award on non-economic issues. *Metropolitan Council No. 23 v. Wayne County,* 86 Mich App 453, 462-463 (1978). Without a doubt, RETROACTIVITY OF A GRIEVANCE PROCEDURES is a "non-economic issue." Did the Court of Appeals clearly err and deviate from *Metropolitan Council No. 23*'s holding when it ordered a 312 Panel to consider a retroactive award on a non-economic issue?**

2. **MCL §423.238 requires a 312 Panel to define the economic issues for determination at or before the conclusion of the hearing. Did the Court of Appeals clearly err when it found that this statute as a matter of law precludes the Michigan Employment Relations Commission from requiring Parties in 312 proceedings to raise issues in the Petition or Response and at the prehearing conference, especially if those issues are noneconomic?**

3. **Act 312 does not apply to subjects of bargaining where the County-co-employer may implement its last bargaining position. The Michigan Supreme Court's decision in *County of Ottawa v Jaklinski*, 423 Mich 1 (1985) found that a county is not obligated to continue the just cause standard of discharge or a grievance procedure, thus taking RETROACTIVITY OF GRIEVANCE PROCEDURES and PROSPECTIVITY OF GRIEVANCE PROCEDURES out of the 312 process. Did the Court of Appeals clearly err and deviate from this holding when it ordered a 312 Panel to consider awarding RETROACTIVITY OF GRIEVANCE PROCEDURES?**

4. **Does a published Court of Appeals decision that conflicts with other Court of Appeals precedent and Michigan Supreme Court precedent, orders a 312 Panel to consider acting outside of its authority to obligate a Michigan County to litigate 12 grievances that arose during a period when there was no collective bargaining agreement, and that procedurally will promote "sandbagging" and "trial by ambush" in Act 312 proceedings present a case of substantial public interest, involve interests importance to the state's jurisprudence against a political subdivision of the State and involve the interpretation of a statute such as to justify leave to appeal to the Michigan Supreme Court?**

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STATEMENT OF MATERIAL FACT & PROCEEDINGS

POAM is the bargaining agent for the sheriff's deputies jointly employed by the Ottawa County Sheriff and the Ottawa County Board of Commissioners ("County Co-employers") on behalf of Defendant-Appellee, Ottawa County.

As the Court is aware, sheriff's deputies' unions and the County Co-employers are obligated to proceed to binding arbitration under MCL §423.231, et. seq, which is commonly known as "Act 312 Arbitration," in the event that the collective bargaining process reaches an impasse on those mandatory subjects of bargaining that are mandatory **and** on which the county-co-employer may **not** implement its last bargaining position. The Act 312 Arbitration process enables the union and the employer to each select a delegate and then the Michigan Employment Relations Commission ("MERC") appoints a neutral. Together, the delegates and the neutral arbitrator form the "312 Arbitration Panel." The neutral arbitrator convenes a prehearing conference and holds a hearing. At the hearing, evidence is presented regarding the parties' bargaining positions on those mandatory subjects of bargaining to which the parties have reached an impasse **and on which the county-co-employer has not implemented its last position**. The status of comparable contractual provisions in comparable counties **on those limited subjects**. The Panel reaches a decision on those limited subjects, which are then implemented and become the provisions in the parties' new collective bargaining agreement.

In this instance, the collective bargaining contract at issue expired on December 31, 1999. At that time, as were their rights under the Michigan Supreme Court's decision in *County of Ottawa v Jaklinski*, 423 Mich 1 (1985), the County Co-employers terminated the "just cause" standards for discharge and the grievance procedure for the sheriff's deputies, who became "at will" employees without any right to pursue a compulsory grievance and arbitration procedure.

On June 5, 2000, POAM filed for Act 312 arbitration with MERC. The Petition identified the "Grievance Procedure" and "Arbitrator's Powers" as issues for resolution, but did **not identify** RETROACTIVITY OF GRIEVANCE PROCEDURES as an issue. MERC appointed Mark J. Glazer as the neutral arbitrator and he convened a prehearing conference pursuant to R 423.507(2)["Rule 7"] on September 19, 2000. A pre-hearing report was prepared on September 25, 200 and **"[t]hereafter, the Association in a telephone re-hearing conference dropped 'grievance procedure' and 'arbitrator's powers' as issues."** See Panel Decision, p. 9, attached as Exhibit C.

RETROACTIVITY OF GRIEVANCE PROCEDURES was raised by the "Association for the first time shortly before the October 2001 arbitration hearing in a September 26, 2001 letter and in a telephone conference in August of 2001." See Panel Decision, p. 9.

At the hearing on October 4, 2001, POAM attempted to present evidence on RETROACTIVITY OF GRIEVANCE PROCEDURES, but the County objected to the evidence for three reasons: (1) RETROACTIVITY OF GRIEVANCE PROCEDURES is outside the jurisdictional scope of 312 Arbitration; (2) RETROACTIVITY OF GRIEVANCE PROCEDURES is a non-economic issue and therefore not subject to retroactivity under Act 312; and (3) that, in any event, was RETROACTIVITY OF GRIEVANCE PROCEDURES not timely raised or preserved as an issue.

On January 3, 2002, the Act 312 Arbitrator Panel issued its opinion and award The Majority (Neutral and County delegate) refused to consider the RETROACTIVITY OF GRIEVANCE PROCEDURES as being timely raised, because to do so would emasculate the Rule 7 issue definition process, discourage settlement and lead to a "sandbagging" of parties at the hearing. See Panel Opinion, pp 10-11. The Panel expressly found that RETROACTIVITY OF GRIEVANCE

PROCEDURES" was not expressed either in the petition or at the prehearing conference, when issues were identified as required by the rules." Opinion, p. 9.

POAM filed this suit, ostensibly challenging the right of the 312 Arbitration Panel to refuse to permit at 312 party to add an issue at the arbitration hearing, relying on certain language in MCL §423.238 for this proposition. The parties agreed that there was no genuine issue of material fact that required further evidentiary development and both sides moved for summary disposition.

The County Co-employers raised two reasons why the 312 Arbitration Panel's decision was correct—(1) that a 312 Arbitration Panel has the right to issue procedural rulings that preclude trial by ambush and obligate the 312 parties to raise and preserve the issues that they want the 312 Arbitration Panel to hear; and (2) that the 312 Panel would have exceeded, ironically, its statutory jurisdiction if it had rendered an award on a voluntary issue of bargaining; namely, the RETROACTIVITY OF GRIEVANCE PROCEDURES..

On September 23, 2002, the Ottawa County Circuit Court heard the joint motions for summary disposition and granted the County Co-employers' motion on the premise that like a circuit court, a 312 Arbitration Panel had the right to establish pre-trial procedures requiring a union or management to raise and preserve issues so that there was no trial by ambush. The Ottawa County Circuit Court did not reach the second issue; namely, the 312 Arbitration Panel's authority to issue awards on voluntary, noneconomic subjects of bargaining, such as the RETROACTIVITY OF GRIEVANCE PROCEDURES and PROSPECTIVITY OF GRIEVANCE PROCEDURES.

The Circuit Court's opinion is short and to the point, and is worth repeating in its entirety:

> THE COURT: All right. Thank you. Act 312 Arbitration is a remedy of last resort, and it anticipates that the parties will have attempted to negotiate all

maters subject to collective bargaining prior to submitting the issues that they cannot reach agreement on to an arbitration panel.

As I understand and read the statute, it does permit the arbitration panel to conduct a pre-hearing conference at which time the panel may order the parties to identify exactly those issues that they intend to have submitted to arbitration. That was done in this case. However, at the arbitration hearing, the Police Officers Association attempted to raise other issues, which the panel ultimately precluded on the basis of the fact that they were not identified as issues to be submitted to arbitration.

I think, much like the Court in a pretrial conference has the authority under the court rule to limit and identify the issues, I think that the statute, as I read it, gives the panel the same right, and in this case the issues that were raised at the hearing were not made part of the issues to be submitted to the panel. Therefore, I do agree that they are precluded.

Now, I think, just like any amendment, if these issues were not known or not discoverable until the time of the hearing, there might be a different situation. But the issues sought to be raised at the hearing were both known and discoverable, and the whole idea behind this Act 312 Arbitration is that the parties have agreed on what they can agree and submit what they can't agree on to the panel.

And in this case to allow a party or either party to reshuffle the deck and add new issues at the hearing where there has been a pre-hearing conference and where the parties have been specifically ordered to identify those issues to be submitted, I think is contrary to the language and the intent of the statute. Therefore, I am going to grant the defendant's motion for summary disposition.

(Circuit Court Opinion, attached as Exhibit D).

POAM timely appealed to the Michigan Court of Appeals. On August 20, 2004 Opinion, the Court of Appeals reversed. In developing its syllogism, the Court of Appeals first interpreted the following sentence from MCL §423.238:

> ...The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive.

Somehow, the Court of Appeals ignored the first half of this sentence, which in its plain meaning should have disposed of the appeal, since the appeal questions whether RETROACTIVITY OF GRIEVANCE PROCEDURES is an issue that was in dispute—a question that the statute says is

conclusively to be answered by the 312 Panel. Instead, the Court of Appeals "jumped" to the second half of the statutory sentence, concluding that since the 312 Panel mentioned this statute as "authority" for its procedural ruling, it must have "implicitly" found that RETROACTIVITY OF GRIEVANCE PROCEDURES is an "economic issue."

Having recognized a false premise; namely that it was dealing with an economic issue, the Court of Appeals could then build the rest of its syllogism, because it could now find the first sentence from MCL §423.238 to be relevant:

> At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute...

With this sentence now relevant, the Court concluded that this language deprived a 312 Panel from restricting issues to those raised by the union petition and employer's answer or those identified in the parties' prehearing conference with the Neutral. The Court of Appeals did so using a ***grammatically incorrect*** reading of the statute as "conjoining" a word and a clause, when proper adherence to the rules grammar would require that that the Courts prefer a conjunction that involves joining either words or clauses, but not one of each. Here's how the Court interpreted the statute:

> "The plain language of MCL 423.238 provides that 'arbitration panel shall identify the economic issues in dispute ***at or before the conclusion of the hearing*** held pursuant to section 6.' The legislature use of the disjunctive 'or' indicates that the Legislature intended for arbitration panels to determine the economic issues in dispute either ***at the hearing*** or ***before the conclusion of the hearing.***"

Court of Appeals' Opinion, p. 3.

A grammatically correct reading of the statute should have been as follows:

> *"at or before the conclusion of the hearing"* means *"at the conclusion of the hearing"* or *"before the conclusion of the hearing."*

As will be noted below, the difference in interpretations alters the purpose of this section, opening the door for the Court of Appeals' syllogism, although even with the grammatically incorrect structure, the Court of Appeals' opinion is still flawed.

The Court of Appeals remanded the case for the 312 Panel to consider the RETROACTIVITY OF GRIEVANCE PROCEDURES issue.

The County Co-employers timely moved the Court to reconsider and to supplement the record—supplying evidence that the POAM in the parties' current 312 proceedings had conceded what every labor lawyer knows; namely, that RETROACTIVITY OF GRIEVANCE PROCEDURES is ***a non-economic issue***. The County Co=employers pointed out in their Motion for Reconsideration that the 312 Panel had not directly or implicitly found that this issue is an "economic issue."

On October 14, 2004, the Court of Appeals denied the motion to supplement the record, but granted the motion for rehearing. However, the Court of Appeals merely republished its original opinion with one change. In footnote 3, it deleted the words "implicitly concluded." Here's a side-by-side comparison of the original footnote 3 and the "corrected" version:

> MCL 423.238 only applies to economic issues. In basing its decision not to allow plaintiff to raise the issue of the retroactive arbitration of grievances at the hearing, the panel implicitly concluded that the issue was economic. Pursuant to MCL 423.238, the panel's determination on this issue was "conclusive."

August 20, 2004 Opinion, Footnote 3.

> MCL 423.238 only applies to economic issues. While appellant challenges both the panel's determination that the retroactivity question is arbitrable and that it is an economic issue, for purposes of this case these determinations are "conclusive."

October 22, 2004 Opinion, Footnote 3.

ARGUMENT

1. **The Court of Appeals legally errs when interpreting a statutory sentence to require conclusive deference to an "implied" 312 Panel finding, and no deference at all to an express 312 Panel Decision made under the same statutory sentence.**

Standard of Review: This issue involves a question of law and is subject to *de novo* review. *Bradley v. Board of Education,* 455 Mich 285, 293 (1997).

The Court of Appeals' logic in its principal holding is incompatible with its logic on rehearing. Essentially, what the Court of Appeals held in response to the County Co-employers' motion for rehearing was that even if RETROACTIVITY OF GRIEVANCE PROCEDURES is legally nonarbitrable (which it is because it is a voluntary subject of bargaining—see discussion *infra*) and even if it is legally ineligible for retroactivity (which it is because only economic issues are statutorily eligible for retroactivity[1]), the Courts are powerless to interfere with the 312 Panel's "implied" or "assumed" decision that this is an arbitrable, economic issue, because under MCL §423.238, the Panel's decisions as to what issues are "economic" and arbitrable are "conclusive."

While the County Co-employers deny that the 312 Panel actually found that RETROACTIVITY OF GRIEVANCE PROCEDURES is arbitrable or that it is an economic issue—as will be discussed *infra*, even if it had done so, the Courts of Appeals rehearing "logic" conflicts with the logic of its principal Opinion. In its principal Opinion, the Court of Appeals rejected the "conclusivity" of the 312 Panel's identification of the issues in dispute (also made under the same sentence in MCL §423.238 under which it found an implied finding of arbitrability), because—according to the Court of Appeals—the Panel's identification of issues conflicts with another sentence in MCL §423.238, which requires the 312 Panel to identify economic issues at or before the end of the hearing. Thus, the Court of Appeals denied conclusively to the Panel's

[1] *Local 1917, Metro Council No. 23, AFSCME v Wayne Co Bd of Comm'rs*, 86 Mich App 453, 462-463 (1978). If a grievance procedure is an "economic" issue, what issue isn't economic?

findings of what issues were in dispute because it found that in so acting, the Panel had violated the law.

The Court of Appeals can't have it both ways. If the conclusivity of the 312 Panel's identification of issues involved in the dispute gives way to legal errors, then so also must the Panel's conclusion as to what issues are arbitrable and economic. Certainly, procedural errors (such as found by the Court of Appeals) should not be given higher consequence than substantive, jurisdictional errors (such as raised by Ottawa County).

Also, the Court of Appeals cannot place weight on one half of a statutory sentence and ignore the first half. Here's the relevant statutory sentence in MCL §423.238 that the Court interpreted in response to the County Co-employers' arguments about arbitrability and retroactivity:

> "The determination of the arbitration panel as to the issues in dispute **and** as to which of these issues are economic **shall be conclusive**."

(Emphasis Added).

The Court of Appeals' Opinion properly notes that statutes are to be given their plain meaning. The plain meaning interpretation of this sentence in MCL §423.238 is that the Panel's decision as to what "issues [are] in dispute" should be as conclusive as the second task that the Legislature gives the Panel in this one sentence, namely to decide "which of these [disputed] issues are 'economic.'" Since POAM is attacking a decision by the 312 Panel as to whether an issue [RETROACTIVITY OF GRIEVANCE PROCEDURES] was properly in dispute, the Panel's decision that this issue wasn't in dispute should have been equally conclusive.

Simply stated, it is a gross error of statutory construction to take the same sentence and give weight to the second clause and ignore the first. Yet, this is exactly what the Court of Appeals has erroneously done in ***its published Opinion.*** The fact of the matter is that by statute

the 312 Panel had the conclusive right to determine what issues were in dispute. Its decision is **not** subject to judicial reversal.

2. The Court of Appeals applied a grammatically incorrect interpretation of the first sentence of MCL §423.238 that conflicts with several rules of statutory construction..

Standard of Review: This issue involves a question of law and is subject to *de novo* review. *Bradley v. Board of Education,* 455 Mich 285, 293 (1997).

A look at this section in its entirety is helpful:

> "***At or before the conclusion of the hearing*** held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last best offer of settlement on each economic issue. ***The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive***. The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make findings of fact and promulgate a written opinion and order upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. ***As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration, more nearly complies with the applicable factors prescribed in section 9.*** The findings, opinion and order as to all other issues shall be based upon the applicable factors prescribed in section 9. This section as amended shall be applicable only to arbitration proceedings initiated under section 3 on or after January 1, 1973."

MCL §423.238. (Emphasis Added).

In footnote 3 of its opinion, the Court of Appeals erroneously finds that MCL §423.238 "only applies to economic issues." As noted above, the second sentence of MCL §423.238 obligates the Panel to identify the issues in dispute, and then to decide whether or not they are "economic." A statute that requires an identification of all issues and then requires a sub-separation of issues that are economic and those that are noneconomic obviously applies to more than just economic issues.

What the Court of Appeals should have said is that the first sentence of MCL §423.238 only applies to "economic" issues. The Court of Appeals reads into the Panel's quotation of the first sentence of the statute in its opinion, an implicit or assumed finding that "RETROACTIVITY OF GRIEVANCE PROCEDURES" is an "economic issue." That is unfair. While the 312 Panel did interpret the first sentence of MCL §423.238, it did so only to illustrate that the Legislature gave it broad discretion to decide what issues are in dispute at anytime in the proceedings, including at the very end of the hearing or before the hearing begins:

> "The use of the word 'or' in the first sentence means that the panel can either decide to identify the economic issues at the end of the hearing or before that time. The *Random House Dictionary of the English Language* defines 'or' as, 'used to connect words, phrases or clauses representing alternatives.' Therefore, the panel can properly decide the relevant issues prior to the arbitration hearing."

312 Panel Opinion, p. 8.

In interpreting the same language in the statute, the Court of Appeals failed to understand that both "at" and "before" modify the phrase "the conclusion of the hearing." Instead, the Court of Appeals erroneously determined that the words "the conclusion" should be divorced from the words "of the hearing" and only attach to the word "before." The result of the Court of Appeals' analysis is that it would have "or" connecting a ***word and a phrase***—a result that it actually expressed with emphasis:

> "The plain language of MCL 423.238 provides that 'arbitration panel shall identify the economic issues in dispute ***at or before the conclusion of the hearing*** held pursuant to section 6.' The legislature use of the disjunctive 'or' indicates that the Legislature intended for arbitration panels to determine the economic issues in dispute either ***at the hearing*** or ***before the conclusion of the hearing.***"

Court of Appeals' Opinion, p. 3 (Emphasis in the original).

The Court of Appeals interprets this sentence to mean "at the hearing" or "at the conclusion of the hearing." This interpretation is grammatically incorrect. The authoritative

English textbook, *Prentice Hall Handbook for Writers (6ht Edition)* (Prentice Hall, Englewood Cliffs, N.J. 1974) notes that coordinating conjunctions such as "or"[2] are to be used to conjoin "words, phrases or clauses of ***equal grammatical rank.***" *Id.,* p. 28. (Emphasis added). Grammatically then, where possible, "or" should **not** be used to conjoin a word and a phrase, as the Court of Appeals has done, but should be interpreted as conjoining either two words or two phrases. Since "at" is otherwise by itself, in MCL §423.238, the rules of grammar dictate that "at" and "before" should be conjoined as equals, both modifying the phrase, "the conclusion of the hearing." Thus, grammatically, the proper interpretation of MCL §423.238 is the one given by the 312 Panel, namely, that a 312 panel should decide the economic issues in dispute "**at** the conclusion of the hearing" or "**before** the conclusion of the hearing," **not** the Court of Appeals' interpretation of "at the hearing" or "before the conclusion of the hearing."

Indeed, the Court of Appeals' decision is illogical, since "at the hearing" or "before the conclusion of the hearing" mean the same thing; namely, that at sometime "during" the hearing, the issues must be defined. The Legislature could have said "at the hearing" and have embraced both of the concepts interpreted by the Court of Appeals. As this Court knows, it is the task of the judiciary to give meaning to every part of a statute and to avoid interpretations—such as the Court of Appeals gave here—that render a section of the statute as surplusage or nugatory. See *Dale v. Beta-C, Inc.*, 224 Mich App 57 (1997).

The significance of the difference in interpretations is that if the statute permits the Panel to determine the issues at the very end of the hearing then it would permit the Panel (or possibly a party) to raise a completely new issue at the end of the hearing after proofs were closed—a result that obviously would not be intended by the Legislature. Accordingly, the proper interpretation is that ***this language has nothing to do with the raising of issues***. Instead, this

[2]Coordinating conjunctions include "and"," but," "or," "nor," and "for". *Id.*

language has the meaning ascribed by the 312 Panel and Ottawa County Circuit Court; namely, that it ***obligates the Panel to "define" the economic issues previously raised by the parties before the Panel renders its decision***, so that the parties know which issues the Panel would be accepting either one or the other's last best offer:

> "...The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make findings of fact and promulgate a written opinion and order upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration, more nearly complies with the applicable factors prescribed in section 9. The findings, opinion and order as to all other issues shall be based upon the applicable factors prescribed in section 9. This section as amended shall be applicable only to arbitration proceedings initiated under section 3 on or after January 1, 1973."

MCL §423.238.

This underscores the principle flaw in the Court of Appeals' reasoning; namely that the reason that the Legislature mandates that 312 panels expressly designate issues as "economic" or not has nothing to do with the procedural question of when issues can be raised, but rather pertains to the Legislature's denial of discretion to 312 panels to forge a middle ground on such issues. That is to say that the entire point of separating economic issues is to require 312 panels to pick one of the parties' last best offers on each economic issue. Again, this means the first sentence has nothing to do with the parties' rights to raise issues, but only obligates the 312 panels to define the economic issues so that the parties know what subjects are going to be "winner take all." In this manner, the Legislature was merely emphasizing the importance of the economic issues.

This discussion exposes yet another flaw in the Court of Appeals' logic. If the first sentence in MCL §423.238 is read as precluding 312 panels from denying a party the right to add

economic issues all the way until the end of the hearing, it does nothing to preclude such panels from obligating the parties to define the noneconomic issues in their petition, response to the petition or at the prehearing conference. Thus, in the present case, the entire opinion of the Court of Appeals hangs on the dubious thread of the "implicit" or "assumed" finding by the 312 Panel that RETROACTIVITY OF GRIEVANCE PROCEDURES is an "economic issue." In other words, if the 312 Panel had found the issue to be noneconomic (which it actually is according to every labor law authority), even the Court of Appeals would have affirmed the Panel's procedural ruling that the issue was not properly raised by POAM.

The Court of Appeals' Opinion, therefore leads to the incongruous result that parties in 312 arbitration ***cannot*** "sandbag" or "ambush" each other at the hearing on ***the less important noneconomic issues***, but they ***can sandbag or ambush*** each other at the hearing ***on the more important economic issues***. In this manner, the Court of Appeals' ruling here violates yet another important rule of statutory construction, namely that illogical results are to be avoided in statutory construction. See *Ford Motor Company v. Lumbermen's Mutual Casualty Company*, 413 Mich. 22 (1982).

In short, the Court of Appeals' statutory construction violates at least two rules of statutory construction and is grammatically incorrect. It is, to say the least, clearly erroneous.

3. The Court of Appeals' Opinion is contrary to the Legislative intent in MCL §423.242 and violates established precedent of the Court of Appeals and Michigan Supreme Court.

Standard of Review: This issue involves a question of law and is subject to *de novo* review. *Bradley v. Board of Education,* 455 Mich 285, 293 (1997).

In order to bring conclusion to an already lengthy process, the Michigan Legislature intended that the judiciary give deference to virtually all rulings of 312 panels. In fact, even

some legal errors are **not** subject to review. Instead, the only legal errors that are reviewable are those that **expand** a panel's jurisdiction:

> "Orders of the arbitration panel shall be reviewable by the circuit court for he county in which the dispute arose or in which a majority of the affected employees reside, but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means. The pendency of such proceeding for review shall not automatically stay the order of the arbitration panel."

MCL §423.242.

In light of this very constricted standard of review, it is fair to say that virtually any procedural error is outside the scope of judicial review. Certainly, the alleged procedural error here; namely, the refusal of the Panel to hear an issue cannot be construed as an "expansion" of the panel's jurisdiction, and therefore the 312 Panel's error (even if it was one) is **not** subject to judicial reversal.[3]

The Opinion of this panel of the Court of Appeals thereby conflicts with the Court of Appeals' decision in *City of Detroit v. Detroit Fire Fighters Association,* 204 Mich App 541, 551 (1994), which refused to apply a *de novo* standard of review to a circuit court's upholding of a 312 panel decision, and instead noted that the any judicial appeal must be tightly constrained to the standards in MCL §423.242. In contrast, the Court of Appeals in the present case actually went so far as to expressly declare that it was applying a *de novo* standard of review (Opinion, p. 2), a declaration that directly conflicts with *City of Detroit*, which itself is directly based on this Court's express ruling on the subject in *Detroit v. Detroit Police Officers Ass'n,* 408 Mich. 410, 480 (1980).

[3] Procedural legal errors of MERC may be the subject of other legal relief, such as a declaratory ruling or superintending control. However, the mechanism of using an appeal from a specific award is not available to raise the kind of error alleged by POAM in this case.

It is telling that the Court of Appeals in the present case did not and could not express its finding of legal error under the grounds enumerated in MCL §423.242's standard of review. In light of the precedent of *City of Detroit* and *Detroit,* it was obligated to do so and it is reversible error for it to have instead applied the *de novo* standard. The Court of Appeals' willingness to boldly apply that standard in a published opinion in blatant disregard of the statute and precedent, will now create confusion in the state's jurisprudence on this important subject, inviting further appeals and creating more delay in the process, which was antithetical to the intentions of the Michigan Legislature in setting forth the constrained standards for appellate review.

4. The Court of Appeals has ordered the 312 Panel to consider illegally expanding its jurisdiction in direct violation of Supreme Court Precedent.

Standard of Review: This issue involves a question of law and is subject to *de novo* review. *Bradley v. Board of Education,* 455 Mich 285, 293 (1997).

There is a more basic problem with the Court of Appeals' Opinion. It directs the 312 Panel to consider undertaking an expansion of its lawful jurisdiction in violation of Act 312 and, thus, the Court of Appeals' decision actually invites a violation of MCL §423.242, which is to say that if Panel actually confers RETROACTIVITY OF GRIEVANCE PROCEDURES, as it has been ordered to consider, it will violate the law because a 312 panel clearly lacks the jurisdiction to make a grievance and arbitration procedure retroactive or prospective.

A. RETROACTIVITY OF GRIEVANCE PROCEDURES and PROSPECTIVITY OF GRIEVANCE PROCEDURES are Outside of a 312 Panel's Jurisdiction.

The Michigan Supreme Court has effectively ruled previously on these issues between these same parties. In *County of Ottawa v Jaklinski*, 423 Mich 1 (1985)—a dispute between POAM and the same County Co-employers, the Michigan Supreme Court held that an

employee's right to arbitrate his grievance does not survive the expiration of the collective bargaining agreement, absent a ***voluntary agreement*** to the contrary. As a practical matter, POAM is pursuing the present case in an effort "gut" the effect of *Jaklinski.*

An Act 312 Panel may only hear those issues that are ***mandatory subjects of bargaining and over which the county-co-employers may not implement their last best offer.*** See *Metropolitan Council No. 23 and Local 1277 AFSCME v City of Center Line,* 414 Mich 642, 654-55 (1982).

The Court in *Jaklinski* clearly stated that ***both RETROACTIVITY OF GRIEVANCE PROCEDURES and PROSPECTIVITY OF GRIEVANCE PROCEDURES are not subjects that a county co-employer can be compelled to include in a contract, but rather may only be the subjects of voluntary agreement:***

> Our holding does not preclude the possibility that employers and employees may be required under a proper contract to arbitrate disputes arising out of post contract discharges. Rather, *we leave control over the question of arbitrability with the parties*, from whose agreement the right to arbitration arises. Unions and employers *can* agree that the terms of employment during a hiatus between contracts will include the right to binding arbitration of some or all grievances. Similarly, they *can* agree that arbitration rights in the new collective bargaining agreement will be given effect retroactively to the date of the expiration of the old agreement.

423 Mich at 28-29 (emphasis added).

Without a doubt, the holdings in *Metropolitan Council 23* and *Jaklinski* leave all 312 Arbitration Panels ***without the jurisdiction*** to issue an award on the very RETROACTIVITY OF GRIEVANCE PROCEDURES issue that the POAM asked the 312 Panel to issue an award upon. As a result, not only is this Court without the jurisdiction to review the 312 Panel's procedural finding that the request was untimely, but this Court would commit legal error under the very review

statute that it must use if it were to order, as POAM requests, the 312 Panel to issue a ruling on a matter that it has no statutory authority to rule upon.

RETROACTIVITY OF GRIEVANCE PROCEDURES would also create a practical nightmare for the County Co-employers. It would require that the Sheriff's termination decisions be reviewed under a discharge standard, "just cause," that the Sheriff did not utilize during the hiatus between the two contracts. If this award is upheld, in the future the County Co-employers could never safely exercise their *Jaklinski* rights to terminate under the "at will" standard because they would have to assume that a later 312 Panel might order the application of the "just cause" standard retroactively, meaning that they would have to be prepared to justify their actions under the higher standard, regardless of *Jaklinski.* If so, what would be the point of implementing the lesser standard?

In a nutshell, this "Hobson's choice" is what the POAM is seeking in order to snatch victory from the jaws of its *Jaklinski* defeat. The Courts should not facilitate POAM's ingenious (if not disingenuous) device.

B. RETROACTIVITY OF GRIEVANCE PROCEDURES is a Noneconomic Issue Which the Panel by statute may not be ordered by a 312 Panel.

Even Act 312 itself, precludes POAM's requested relief, because it limits retroactivity to "economic" issues, as distinguished from noneconomic issues. Section 10 of Act 312 provides, in part:

> Increases in rates of compensation or other benefits may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provisions to the contrary notwithstanding.

MCL §423.240. This statute has been interpreted to confer upon a 312 Panel the authority to award wages and benefits retroactively, but **not** the authority to order the retroactive application of noneconomic mandatory subjects of bargaining, such as the grievance procedure ***during*** the

contract. Indeed, Michigan courts have held that section 10's " broad powers do **not** include the power to grant retroactivity to noneconomic benefits," reasoning as follows:

> The Michigan Legislature clearly states that "increases (in rates of compensation) may be retroactive", but only back to the commencement of the fiscal year, I. e., December 1, 1974. The Legislature specifically speaks of retroactivity but only in regards to economic benefits. The Legislature was conspicuously silent on retroactivity of noneconomic benefits. We hold that had the Legislature intended for arbitration panels acting under the 1969 Act to have the power to grant retroactivity to the subject noneconomic provisions, they would have so provided. This Court is constrained to hold that the intent of the Michigan Legislature was not to grant such retroactivity.

Metropolitan Council No. 23 and Local 1917, AFSCME v Board of Com'rs of Wayne County, 86 Mich App 453, 462-3 (1979).

An Act 312 Panel simply does not have the authority to issue retroactive awards except in the limited instances of compensation and other economic benefits. As the right to grievance and arbitration is clearly a noneconomic benefit, the Panel could not have awarded the Association's claim even if it had been properly submitted.

6. The issues raised in this Application satisfy all 3 relevant "Grounds" for Supreme Court Review in MCR 7.302.

As this Court knows, MCR 7.302(B) requires that an Application for Leave to Appeal demonstrate that the issues involved: (1)...involve a substantial question as to the validity of a legislative act; or (2)...have a significant public interest and involve political subdivisions of the state; or (3)...involve legal principles of major significance to the state's jurisprudence. The County Co-employers contend that this Application meets all three of these disjunctive tests.

The 312 arbitration is a matter of substantial public interest because it involves first responders to the public's requests for police and fire assistance. The Court of Appeals' Opinion in this case is to be published and will have a major impact on the way Act 312 proceedings operate, because as found by both the 312 Panel and the Ottawa County Circuit Court, the

statutory construction proffered by POAM and now endorsed by the Michigan Court of Appeals will render the 312 procedure chaotic, enabling either the employer or the union to "sandbag" the other by raising economic (and apparently noneconomic) issues for the first time at the hearing—or even the end of the hearing, despite MERC published rules that require the filing of a petition (R 423.505) and identification of issues at a prehearing conference (R 423.507):

> ...There is also a practical reason for reaching this conclusion. A contrary result would allow parties in the future to "sandbag" each other with new issues at the time of the haring or shortly before, to the detriment of the process. I want to emphasize that the Association is totally in good faith in this case, and that it has serious and legitimate concerns.
>
> However, if I were to create a precedent by allowing an issue to be added near or at the hearing when it is opposed by the other side, serious problems could be created. For instance, an employer could discover during the pendency of a 312 hearing that its health care provider had dramatically increased its costs. If the employer could add issues at the last minute, there would be nothing to prevent the employer from requesting a change in the health care provider, even though it had not previously presented that as an issue. If the union had reached prior settlement on other issues, with the expectation the health care provider would not be an issue, the sudden introduction of the health care issue could be unfair and could lead to an unexpected and unanticipated result.
>
> Moreover, if the issues could be added at the last minute absent an agreement, the pre-hearing required by MERC as well as the petition as required by Act 312 could be rendered meaningless. The issues included in the petition and at the pre-hearing would only represent possibilities could be changed unilaterally, and at the last moment. This would discourage the parties from reaching settlement and would make it difficult for them to prepare for Act 312 hearings, since they wouldn't know what were the final issues...

(312 Panel Opinion, p. 11).

> I think, much like the Court in a pretrial conference has the authority under the court rule to limit and identify the issues, I think that the statute, as I read it, gives the panel the same right, and in this case the issues that were raised at the hearing were not made part of the issues to be submitted to the panel. Therefore, I do agree that they are precluded.
>
> Now, I think, just like any amendment, if these issues were not known or not discoverable until the time of the hearing, there might be a different situation. But the issues sought to be raised at the hearing were both known and

> discoverable, and the whole idea behind this Act 312 Arbitration is that the parties have agreed on what they can agree and submit what they can't agree on to the panel.
>
> And in this case to allow a party or either party to reshuffle the deck and add new issues at the hearing where there has been a pre-hearing conference and where the parties have been specifically ordered to identify those issues to be submitted, I think is contrary to the language and the intent of the statute. Therefore, I am going to grant the defendant's motion for summary disposition.

(Circuit Court Opinion).

As argued *supra*, this case involves statutory interpretation issues of first impression and an interpretations that violate the rules of statutory construction, as well as significant labor law precedent issued by other panels of the Court of Appeals and by this Court. Thus, this case is a matter of substantial interest to the State's jurisprudence. The apparently undisputed fact that it will also create chaos in the preparation for 312 hearings and thus lend uncertainty to an already complicated area of substantive and procedural law involving the economics surrounding what are, arguably, our society's most important public services only cements the need for Supreme Court review.

CONCLUSION

The County Co-employers request that this Court accept this case for either complete or summary review, and upon review, reverse the October 14, 2004, published opinion of the Michigan Court of Appeals and affirm the Ottawa County Circuit Court Judgment and Order, which affirms the 312 Panel Decision as to the issues in dispute in this matter.

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Dated: November 26, 2004

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